89-1057

NO. _____

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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

J & N VIDEO, INC.,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CAMPBELL COUNTY CIRCUIT COURT OF CAMPBELL COUNTY KENTUCKY

PETITION FOR WRIT IN A CRIMINAL CASE

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QUESTIONS PRESENTED

Does a violation of due process or equal protection of the law, as guaranteed by the Fifth and Fourteenth Amendments, occur when a state creates a system of appellate courts and those courts refuse to address the non-frivolous contentions of a convicted criminal defendant concerning alleged errors which occurred in the trial court?

Did the Kentucky District Court abuse its discretion and violate Petitioner's right to a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution when it refused to allow a criminal defendant in an obscenity case the right to present expert testimony on the issue of the proper contemporary community standards that must be applied by a jury to determine whether a challenged item appeals to the prurient interest and whether the particular item contains a patently offensive depiction of sexual conduct?

STATEMENT OF CORPORATE AFFILIATE

J & N Video, Inc. has been merged into The Video Store, Inc.

The Video Store, Inc. is a subsidiary of Vestron, Inc.

J & N Video, Inc. is not affiliated with or the parent of any other corporate entity.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF CORPORATE AFFILIATE	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
Fifth Amendment, United States Constitution	2
Fourteenth Amendment, United States Constitution	2
Section One, Constitution of the Commonwealth of Kentucky	3
Section Two, Constitution of the Commonwealth of Kentucky	3
Section Eight, Constitution of the Commonwealth of Kentucky	4
Kentucky Revised Statutes § 531.010	4
Kentucky Revised Statutes § 531.020	5
STATEMENT OF THE CASE	6
A. *Course of Proceedings And Disposition In The Court Below*	6
B. *Statement of Facts*	7
REASONS FOR GRANTING THE WRIT	10
I. WHEN A STATE HAS CREATED AN APPELLATE COURT SYSTEM IT IS A VIOLATION OF DUE PROCESS AND EQUAL	

Page

PROTECTION OF THE LAW TO DENY A CONVICTED CRIMINAL DEFENDANT THE RIGHT TO AN APPEAL BY FAILING TO ADDRESS NON-FRIVOLOUS ARGUMENTS RAISED BY THE DEFENDANT 10

McKane v. *Durston*, 153 U.S. 684, 14 S.Ct. 913 (1984) 10

Evitts v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985) ... 10

Ake v. *Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1094 (1985), citing *Ross* v. *Moffit*, 417 U.S. 600, 612, 94 S.Ct. 2437, 2444 (1974) 10

Gardner v. *California*, 383 U.S. 367, 368, 89 S.Ct. 580, 581 (1969) 10

Griffin v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956) ... 11

United States, ex rel. Lloyd, v. *Vincent*, 520 F.2d 1272 (2d Cir. 1975), cert. denied, 423 U.S. 937, 96 S.Ct. 296 (1975) 11

II. THE TRIAL COURT ERRED BY FAILING TO PERMIT PETITIONER TO PRESENT EXPERT TESTIMONY RELATIVE TO THE CONTEMPORARY COMMUNITY STANDARDS AND WHETHER THE PARTICULAR MATERIAL WOULD APPEAL TO THE PURIENT INTEREST OF AN AVERAGE MEMBER OF THE COMMUNITY AND WHETHER THE PARTICULAR MATERIAL WAS A PATENTLY OFFENSIVE DEPICTION OF SEXUAL CONDUCT. ... 13

United States v. *Pryba*, 672 F.Supp. 1225 (E.D. Va. 1988) 13

Miller v. *California*, 413 U.S. 15, 24, 92 S.Ct. 2607, 2615 (1973) 14

Page

Paris Adult Theatre I. v. *Slaton*, 413 U.S. 49, 96 S.Ct. 2628 (1973) 14

Kaplan v. *California*, 413 U.S. 115, 93 S.Ct. 2680 (1973) 14

Smith v. *California*, 361 U.S. 147, 80 S.Ct. 2315 (1959) 14

Baumholser v. *Amax Coal Co.*, 630 F.2d 550 (7th Cir. 1980) 16

Otero v. *Mesa Cty. Valley School District No. 51*, 568 F.2d 1312 (10th Cir. 1978) 16

The Standard Oil Co. v. *Standard Oil Co.*, 252 F.2d 65 (10th Cir. 1958) 16

Selchon & Righter Co. v. *Decipher, Inc.*, 598 F.Supp. 1489 (E.D. Va. 1984) 16

Carlock v. *State*, 609 S.W. 2d 787 (Tex. Crim. App. 1980) 16

Commonwealth v. *Trainor*, 374 Mass. 796, 374 N.E. 2d 1216 (1978) 16

Zippo Manufacturing Co. v. *Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963) 16

In Re: Crown Zelerbach Corp., 51 F.T.C. 1105 (1955) 17

The Trademark Act of 1946, 15 U.S.C. § 1501 *et seq.* 17

Roux Labs, Inc. v. *Clairol, Inc.*, 427 F.2d 823 (C.C.P.A. 1970) 17

Monsanto Chemical Co. v. *Perfect Fit Products Mfg. Co.*, 349 F.2d 389 (2d Cir. 1965) 17

McCormick *Law of Evidence*, 2d Ed., § 249 17

Pinkus v. *United States*, 436 U.S. 293, 98 S.Ct. 1808 (1978) 17, 19

Page

Kaplan v. *California*, 413 U.S. 115, 121, 93 S.Ct. 2680 (1973) 17

United States v. *Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975) 17

United States v. *Womack*, 509 F.2d 368 (D.C. Cir. 1972) 17-18

Knight v. *State*, 642 S.W.2d 180 (Tex. Crim. App. 1982) 18

Carlock v. *State*, 609 S.W.2d 787 (Tex. Crim. App. 1980) 18

People v. *Nelson*, 43 Ill. 476, 410 N.E.2d 476 (1980) .. 18

Miller v. *California*, 413 U.S. 15, 32, 93 S.Ct. 2607 (1973) 18, 19

CONCLUSION 19

CERTIFICATE OF SERVICE 20

APPENDIX

Copy of Order Denying Discretionary Review of The Supreme Court of Kentucky 1a

Copy of Corrected Order Denying Discretionary Review of The Court of Appeals 2a

Copy of Judgment Entry of the Campbell Circuit Court, Second Division 3a

Copy of Trial And Verdict of the Campbell District Court, Division No. Three 8a

TABLE OF AUTHORITIES

Cases: Page

Ake v. *Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1094 (1985), citing *Ross* v. *Moffit*, 417 U.S. 600, 612, 94 S.Ct. 2537, 2444 (1974) 10

Baumholser v. *Amax Coal Co.*, 630 F.2d 550 (7th Cir. 1980) 16

Carlock v. *State*, 609 S.W.2d 787 (Tex. Crim. App. 1980) 16, 18

Commonwealth v. *Trainor*, 374 Mass. 796, 374 N.E.2d 1216 (1978) 16

Evitts v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985) 10

Gardner v. *California*, 383 U.S. 367, 368, 89 S.Ct. 580, 581 (1969) 10

Griffin v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956) 10

In Re: Crown Zelerbach Corp., 51 F.T.C. 1105 (1955) 17

Kaplan v. *California*, 413 U.S. 115, 93 S.Ct. 2680 (1973) 14, 17

Knight v. *State*, 642 S.W.2d 180 (Tex. Crim. App. 1982) 18

McKane v. *Durston*, 153 U.S. 684, 14 S.Ct. 913 (1984) .. 10

Miller v. *California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615 (1973) 14, 18, 19

Monsanto Chemical Co. v. *Perfect Fit Products Mfg. Co.*, 349 F.2d 389 (2d Cir. 1965) 17

Otero v. *Mesa Cty. Valley School District No. 51*, 568 F.2d 1312 (10th Cir. 1978) 16

Paris Adult Theatre I. v. *Slaton*, 413 U.S. 49, 96 S.Ct. 2628 (1973) 14

Page

People v. *Nelson*, 43 Ill. 476, 410 N.E.2d 476 (1980) 18

Pinkus v. *United States*, 436 U.S. 293, 98 S.Ct. 1808 (1978) 17, 19

Roux Labs, Inc. v. *Clairol, Inc.*, 427 F.2d 823 (C.C.P.A. 1970) 17

Selchon & Righter Co. v. *Decipher, Inc.*, 598 F.Supp. 1489 (E.D. Va. 1984) 16

Smith v. *California*, 361 U.S. 147, 80 S.Ct. 2315 (1959) . 14

The Standard Oil Co. v. *Standard Oil Co.*, 252 F.2d 65 (10th Cir. 1958) 16

United States, ex rel. Lloyd, v. *Vincent*, 520 F.2d 1272 (2nd Cir. 1975), cert. denied, 423 U.S. 937, 96 S.Ct. 296 (1975) 11

United States v. *Pryba*, 678 F.Supp. 1225 (E.D. Va. 1988)..... 13

United States v. *Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975) 17

United States v. *Womack*, 509 F.2d 368 (D.C. Cir. 1972) 17-18

Zippo Manufacturing Co. v. *Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963) 16

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, United States Constitution 2

Fourteenth Amendment, United States Constitution 2

Section One, Constitution of the Commonwealth of Kentucky..... 3

Section Two, Constitution of the Commonwealth of Kentucky..... 3

Page

Section Eight, Constitution of the Commonwealth of Kentucky 4

STATUTES:

The Trademark Act of 1946, 15 U.S.C. § 1501 *et seq.* ... 17

Kentucky Revised Statutes § 531.010 4

Kentucky Revised Statutes § 531.020 5

OTHER:

McCormick *Law of Evidence*, 2d Ed., § 249 17

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OPINIONS BELOW

The decision of the Supreme Court of Kentucky denying discretionary review in this matter was not published. (Copy attached; appendix p. 1a.) The decision of the Kentucky Court of Appeals denying discretionary review in this matter was also not published. (Copy attached; appendix p. 2a.) The decision of the Campbell Circuit Court in this matter was not reported. (Copy attached; appendix p. 3a.) The decision of the Campbell District Court (the trial court) in this matter was not reported. (Copy attached; appendix p. 8a.)

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Kentucky denying review was entered on October 11, 1989. The judgment of the Campbell Circuit Court was entered March 9, 1989. Rehearing was not sought. The writ of certiorari is requested pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment, Section 1, United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section One, Constitution of the Commonwealth of Kentucky, provides that:

> **§ 1 Inherent and inalienable rights**
>
> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
>
> First: The right of enjoying and defending their lives and liberties.
>
> Second: The right to worshipping Almighty God according to the dictates of their consciences.
>
> Third: The right of seeking and pursuing their safety and happiness.
>
> Fourth: The right of freely communicating their thoughts and opinions.
>
> Fifth: The right of acquiring and protecting property.
>
> Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
>
> Seventh: The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons.

4. Section Two, Constitution of the Commonwealth of Kentucky provides that:

> **§ 2 Absolute power does not exist in a republic**
>
> Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic not even in the largest majority.

5. Section Eight, Constitution of the Commonwealth of Kentucky provides that:

> § 8 **Liberty of speech; freedom of the press**
>
> Printing presses shall be free to every person who undertakes to examine the proceedings of the general assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

6. The statutes under which Petitioner was prosecuted state that:

> **531.010 Definitions**
>
> As used in this chapter:
>
> (1) "Distribute" means to transfer possession of, whether with or without consideration.
>
> (2) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines, or materials.
>
> (3) "Obscene" means:
>
> (a) To the average person, applying contemporary community standards, the predominant appeal of the matter, taken as a whole, is to prurient interest in sexual conduct; and
>
> (b) The matter depicts or describes the sexual conduct in a patently offensive way; and
>
> (c) The matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> (4) "Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse,

or deviant sexual intercourse; or physical contact with the genitals, flagellation, or excretion for the purpose of sexual stimulation or gratification.

531.020 Distribution of obscene matter

(1) A person is guilty of distribution of obscene matter when, having knowledge of its content and character, her:

(a) Sends or causes to be sent into this state for sale or distribution; or

(b) Brings or causes to be brought into this state for sale or distribution; or

(c) In this state, he:

1. Prepares, or

2. Publishes, or

3. Prints, or

4. Exhibits, or

5. Distributes, or

6. Offers to distribute, or

7. Has in his possession with intent to distribute, exhibit or offer to distribute, any obscene matter.

(2) Distribution of obscene matter is a Class B misdemeanor unless the defendant has in his possession more than one unit of material coming within the provisions of this chapter, in which case it shall be a Class A misdemeanor.

STATEMENT OF THE CASE

A. Course of Proceedings And Disposition In The Court Below

On June 1, 1988, a criminal complaint was filed against J & N Video, Inc. (Petitioner) by the Commonwealth of Kentucky. The complaint charged Petitioner with violating Kentucky Revised Code 531.020 (hereinafter "KRS _____"). Subsequently, Petitioner entered a plea of not guilty and dates were set by the Campbell County District Court for both the filing of pre-trial motions and for jury trial.

Included in the pre-trial motions filed by Petitioner was a motion to dismiss. The grounds for this motion were that the Kentucky Obscenity Law, KRS 531.010 and 531.020, are unconstitutional under the Constitution of the Commonwealth of Kentucky, and particularly under Sections One, Two and Eight. Furthermore, Petitioner argued that these statutes intruded upon an individual's right to privacy as guaranteed by the Kentucky Constitution in Sections One and Two. Following a hearing, the trial court denied the motion to dismiss.

On August 8, 1988, a jury was empaneled and trial commenced. The District Court submitted the case to the jury upon instructions, and the jury returned a verdict of guilty. The jury recommended a ten thousand dollar ($10,000.00) fine. The trial court accepted the verdict and imposed the fine on August 12, 1988. A motion for a new trial was filed on August 15, 1988, and an order denying that motion was entered on August 24, 1988.

A notice of appeal to the Campbell County Circuit Court was filed on September 1, 1988, and served by the clerk of courts on September 6, 1988. The appeal was assigned to a single judge, the Honorable Leonard L. Kopowski. On March 19, 1989, Judge Kopowski affirmed the decision of the trial court without oral argument as requested by Petitioner. Judge Kopowski addressed certain alleged errors but completely neglected to discuss the constitutional questions raised under the Kentucky Constitution. *See* Appendix pp. 6-7.

A motion for a discretionary review was filed with the Kentucky Court of Appeals on April 5, 1989. The Kentucky Court of Appeals is the first appellate level in the Kentucky system which provides for a multi-judge panel of review. Notwithstanding that no court had ever expressly addressed Petitioner's contentions under the Kentucky Constitution, the Kentucky Court of Appeals denied review. Similarly, on April 5, 1989, a motion for a discretionary review was filed with the Supreme Court of Kentucky, and the motion was denied by an entry dated October 11, 1989.

B. Statement of Facts

Petitioner J & N Video, Inc. is a corporation duly-formed under the laws of the Commonwealth of Kentucky and operated a retail home-video entertainment business in the Martha Layne Collins Shopping Mall in Cold Springs, Kentucky. On June 1, 1988, a complaint was filed against Petitioner alleging that on May 21, 1988, the corporation, unlawfully and with knowledge of its content and character distributed, offered to distribute or had in its possession with intent to distribute, four (4) units of allegedly obscene matter consisting of four (4) video-cassette tapes in violation of KRS 531.202. Such an allegation would have constituted a Class A misdemeanor.

On August 8, 1988, a jury was empaneled and trial commenced. The District Court empaneled the minimum of six (6) jurors. No alternates were empaneled. During the prosecution's case-in-chief the four (4) video-cassettes were introduced into evidence. However, the Commonwealth only actually showed two (2) of the four (4) video-tape programs to the jury. The remaining two (2) video-tape programs were shown to the jury by Petitioner during the presentation of its defense.

Also, in its defense, Petitioner presented Dr. Robert Noelker, a clinical psychologist with an extensive Northern Kentucky practice as a witness. Despite being determined to be a qualified expert, the trial court refused to allow Dr.

Noelker to state an opinion on whether the video-tapes in question, taken as a whole and applying contemporary community standards, appealed to the "prurient interest" of the average adult Campbell County resident. Dr. Noelker was permitted to testify that, based upon his education, training and involvement in the community, he had such an opinion. That opinion was proffered so as to be part of the record, and it was relevant, material and advantageous to the defense of Petitioner. Dr. Noelker's opinion was that the video-tapes did not appeal to the "prurient interest" of the average adult Campbell County resident.

An additional defense witness, Dr. Joseph E. Scott, was called to testify. The attorney for the Commonwealth requested a voir dire of Dr. Scott to determine his qualifications and the relevance of his testimony. The examination disclosed that Dr. Scott, in addition to being the Director of the Criminology & Criminal Justice Center at Ohio State University, had earned a Bachelor of Science degree from the University of Utah, a Master of Science degree from Indiana University, and a doctorate from Indiana University. Dr. Scott testified that he was a trained sociologist familiar with conducting and interpreting public opinion polls and surveys. While Dr. Scott's further extensive credentials were set forth, together with the relevancy of his testimony on the issues of the Campbell County community standards, as those standards related to the appeal to the "prurient interest," the trial court refused to permit Dr. Scott to testify before the jury.

A proffer of Dr. Scott's testimony was made for the record. The proffer revealed that Dr. Scott had conducted a scientifically valid and reliable public opinion survey relative to the contemporary community standards of the adult population of Campbell County, Kentucky, during the Spring of 1988. The survey itself was proffered and made part of the record. Dr. Scott further proffered that, not only was the survey of the local community relevant because it would assist the jury in determining what the contemporary standards of the community were in this case, but it would allow a trained

sociologist and/or a criminologist to formulate an expert opinion on the relevant contemporary community standards and on what material would appeal to the "prurient interest" of the average adult person in Campbell County, Kentucky.

The survey demonstrated that, although the actual video-tapes in issue in this case were not shown to the survey participants, the specific nature of the sexual depictions contained in the video-tapes were described in detail to each participant in the survey. Moreover, the proffer showed that the results of the survey clearly demonstrated that these video-tape programs did not appeal to the "prurient interest" of the applicable community.

Finally, Dr. Scott proffered that he had made a systematic study under an accepted methodology of sexually-explicit materials with relation to the Kentucky Obscenity Law, and that based on this study, he held the opinion that the video-tapes in this case were not patently offensive and did not appeal to the prurient interest in sex of the average adult in Campbell County, Kentucky. None of this evidence was permitted to be placed before the jury.

The jury returned a guilty verdict. Petitioner was sentenced as appears of record.

REASONS FOR GRANTING THE WRIT

I. WHEN A STATE HAS CREATED AN APPELLATE COURT SYSTEM IT IS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW TO DENY A CONVICTED CRIMINAL DEFENDANT THE RIGHT TO AN APPEAL BY FAILING TO ADDRESS NON-FRIVOLOUS ARGUMENTS RAISED BY THE DEFENDANT.

It is well-established that the individual states are not required to grant any criminal appeal by the United States Constitution. *McKane* v. *Durston*, 153 U.S. 684, 14 S.Ct. 913 (1984). However, it is equally well-established, that if a state has created a system of appellate courts, the procedure used in determining criminal appeals must comport with the demands of both the due process and equal protection clauses of the United States Constitution. *Evitts* v. *Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985).

The issue presented in this case is whether a criminal defendant is entitled to some form of express review of its non-frivolous claims of error in order to ensure a meaningful appellate review of a criminal conviction. It has been held that due process requires that criminal defendants must be provided "an adequate opportunity to present their claims fairly within the adversary system." *Ake* v. *Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1094 (1985), citing *Ross* v. *Moffit*, 417 U.S. 600, 612, 94 S.Ct. 2437, 2444 (1974).

The Fourteenth Amendment's due process guarantee of fundamental fairness requires states provide a criminal defendant "the opportunity to participate *meaningfully* in a judicial proceeding in which his liberty is at stake." *Ake* v. *Oklahoma*, 470 U.S. at 76, 105 S.Ct. at 1093 (emphasis added). Additionally, the Supreme Court has recognized that access to the trial record is one consideration "which makes any appellate review *meaningful*. . . ." *Gardner* v. *California*, 383 U.S. 367, 368, 89 S.Ct. 580, 581 (1969). Similarly, there is no meaningful distinction between a rule which would

deny indigents the right to defend themselves at trial and a rule that denies them adequate appellate review. *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956).

Thus, this Court has long insisted that any appellate review must be a meaningful review of the process by which the defendant was convicted. Any meaningful review of the trial court's procedure must include consideration of the defendant's alleged errors which occurred at the trial. When an appellate court fails to address non-frivolous contentions of a criminal defendant it has effectively denied that defendant a meaningful review as certainly as if it denied an indigent defendant a transcript of the proceedings or the effective assistance of an attorney.

There can be no fundamental, logical difference between the guaranteee of a meaningful and effective appellate review in these different areas. The purpose behind the requirement that an indigent defendant is entitled to a copy of the trial transcript is to ensure a meaningful review by an appellate court. The purpose behind the requirement that an attorney must be appointed for an indigent's first appeal is to ensure proper review of errors or other irregularities which may have occurred at the trial. When an appellate court fails to address arguable, non-frivolous arguments, there can be no guarantee of that meaningful review.

Another important consideration implicated by the failure of an appellate court to address a defendant's contentions, is the public's trust in the judicial process. Public trials serve not only to protect a defendant from being dealt with unjustly, but also help to preserve the public's trust in the judicial process by preventing the abuses of secret tribunals. *United States, ex rel. Lloyd*, v. *Vincent*, 520 F.2d 1272 (2d Cir. 1975), cert. denied, 423 U.S. 937, 96 S.Ct. 296 (1975). The only manner by which the public can be assured that the appellate courts properly perform their functions is by their decisions and opinions. When those decisions and opinions fail to discuss non-frivolous contentions, there can be no con-

fidence that those positions were in fact given due consideration.

Accordingly, an appellate court should be required to address a defendant's non-frivolous contentions by the same considerations which underline the decision providing for meaningful appellate review that this Court has guaranteed to indigents. Without such a requirement, meaningful review can never be assured, not only to indigents, but to all criminal defendants. Finally, permitting an appellate court to ignore these contentions would emasculate this Court's requirements designed to insure meaningful review of a defendant's conviction.

II. THE TRIAL COURT ERRED BY FAILING TO PERMIT PETITIONER TO PRESENT EXPERT TESTIMONY RELATIVE TO THE CONTEMPORARY COMMUNITY STANDARDS AND WHETHER THE PARTICULAR MATERIAL WOULD APPEAL TO THE PRURIENT INTEREST OF AN AVERAGE MEMBER OF THE COMMUNITY AND WHETHER THE PARTICULAR MATERIAL WAS A PATENTLY OFFENSIVE DEPICTION OF SEXUAL CONDUCT.

As noted in the Statement of Facts, the trial court refused to allow Petitioner to place before the jury the relevant expert testimony of Dr. Robert Noelker and Dr. Joseph Scott, which included a survey of the appropriate community and expert opinion based on the results of the survey, and the opinion of an expert based upon his knowledge of the community and his study of sociology.

The Campbell County Circuit Court relied heavily upon *United States* v. *Pryba*, 678 F.Supp. 1225 (E.D. Va. 1988), in upholding the refusal of this evidence; however, this reliance was misplaced.

The *Pryba* Court did hold that:

> As shown, the [public opinion] poll's evidentiary value was, if not nonexistent, minimal *because it did not adequately explain to interviewees the content of the charged materials and did not focus on the acceptability of such material*. *Id.* at 1230 (emphasis added).

Furthermore, the *Pryba* Court also stated the expert testimony in that case was inadmissible since that testimony based on "ethnography" was merely a "scientific disguise." *Id.* at 1233.

In this particular case, Dr. Robert Noelker was a clinical psychologist with an extensive practice in the community from which the contemporary community standards were to be determined. The decisions of this Court leave no room to

doubt that a work is obscene, and therefore unprotected by the First Amendment to the United States Constitution, if, and only if, "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . [and] the work depicts or describes conduct, in a patently offensive way . . . [and] the work, taken as a whole, lacks serious literary, artistic or political value." *Miller* v. *California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615 (1973) (citations omitted).

Subsequent to the *Miller* decision, this Court recognized that the jury has a difficult task in determining these community standards. In *Pinkus* v. *United States*, 436 U.S. 293, 300-301, 98 S.Ct. 1808, 1813 (1978), the Court clearly expressed its approval of giving the jury "[c]autionary instructions to avoid subjective personal and private views in determining community standards . . . [and] tell[ing] the individual juror that in evaluating the hypothetical 'average person' he is to determine the collective view of the community, *as best it can be done.*" (Emphasis added.)

The Commonwealth of Kentucky contended that expert testimony from a clinical psychologist such as Dr. Noelker regarding whether the particular materials were obscene was not necessary because the materials were, in fact, placed in evidence before the jury. Such an argument misconstrues the holding of *Paris Adult Theatre I.* v. *Slaton*, 413 U.S. 49, 96 S.Ct. 2628 (1973). The specific holding of *Paris Adult Theatre I* addresses the evidence that is necessary for the government to prove its case; whether a conviction was based upon sufficient evidence as a matter of law. *Paris Adult Theatre I* does not address the question of what evidence the defendant in an obscenity case is permitted to present by the Constitution or law.

This crucial distinction was expressly recognized by this Court in *Kaplan* v. *California*, 413 U.S. 115, 93 S.Ct. 2680 (1973), where the Court reaffirmed Justice Frankfurter's declaration in his concurring opinion to *Smith* v. *California*, 361 U.S. 147, S.Ct. 2315 (1959), that in an obscenity case

"[t]he defense should be free to introduce appropriate expert testimony. . . ." Accordingly, not only was Dr. Noelker's expert opinion based upon his extensive clinical practice in the community admissible, but so was the scientifically valid and reliable public opinion poll conducted by Dr. Joseph Scott.

To prevent one charged with an obscenity crime from presenting evidence on the elements of obscenity is to effectively preclude any substantial defense to that element of the charged crime. The only possible means usually open to a defendant to avoid the punishment associated with crime involving obscenity is to prove that the materials are not obscene. Given the necessarily subjective nature of the definition of obscenity, if the defendant is precluded from presenting evidence of experts and scientifically valid and reliable opinion polls and surveys, then he is effectively precluded from placing any evidence before the jury on that issue.

Indeed, Justice Frankfurter clearly recognized the dilemma in which a defendant could find himself and, further, recognized the constitutional implications of refusing this type of evidence:

> [T]he right of one charged with obscenity — a right implicit in the very nature of the legal concept of obscenity — [is] to enlighten the judgment of the tribunal, *be it the jury* or in this case the judge, *regarding the prevailing literary and moral community standards and to do so through qualified experts.* It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. They coalesce, for *community standards* or the psychological or physiological consequences of questioned literature *can as a matter of fact hardly be established expert through experts.* Therefore, *to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very heart of the defense and therefore to the constitutional safeguards of due process.* *Smith* v. *California*, at 164-165, 80 S.Ct. at 225 (Frankfurter, J., concurring; emphasis added).

Therefore, exclusion of this type of expert opinion violates the due process clause of the Fifth and Fourteenth Amendments because it prohibits the only type of evidence available to a defendant.

Furthermore, courts are tending to admit surveys and public opinion polls in cases other than obscenity as competent evidence with a minimal evidentiary basis. *See e.g. Baumholser* v. *Amax Coal Co.*, 630 F.2d 550 (7th Cir. 1980) ("There must be some showing that the poll is conducted in accordance with generally accepted survey principles and that the results are used in a statistically correct manner."); *Otero* v. *Mesa Cty. Valley School District No. 51*, 568 F.2d 1312 (10th Cir. 1978) (statistical evidence submitted on behalf of both plaintiffs and defendants); *See also The Standard Oil Co.* v. *Standard Oil Co.*, 252 F.2d 65 (10th Cir. 1958); *Selchon & Righter Co.* v. *Decipher, Inc.*, 598 F.Supp. 1489 (E.D. Va. 1984); *Carlock* v. *State*, 609 S.W.2d 787 (Tex. Crim. App. 1980); *Commonwealth* v. *Trainor*, 374 Mass. 796, 374 N.E.2d 1216 (1978).

A very thoughtful decision regarding this issue was rendered by a United States District Court in *Zippo Manufacturing Co.* v. *Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963). There the court aptly summarized the prevailing legal attitude with regard to the admissibility of surveys, especially in the fact of the usual hearsay objection. The court stated that:

> The weight of case authority, the consensus of legal writers, and reasoned policy considerations all indicate that the hearsay rule should not bar the admission of properly conducted public surveys. *Id.* at 682.

While several grounds of admissibility are viable and well-trodden, it should be noted that the reliability of scientifically conducted surveys has become so universally accepted that many cases admit them without concern for technical objec-

tions. *See e.g. In Re: Crown Zelerbach Corp.*, 51 F.T.C. 1105 (1955).

Indeed, the utilization of such surveys as evidence is now statutorily encouraged, particularly on the federal level. *See e.g. The Trademark Act of 1946*, 15 U.S.C. § 1501 *et seq.* Courts are currently concerned not with the admissibility of such surveys; rather they have been noting with regret *the lack of survey information* to guide trial courts and juries especially when state of mind considerations are at issue. *See Roux Labs, Inc.* v. *Clairol, Inc.*, 427 F.2d 823 (C.C.P.A. 1970); *Monsanto Chemical Co.* v. *Perfect Fit Products Mfg. Co.*, 349 F.2d 389 (2d Cir. 1965). Expressions indicative of the state of mind, attitudes or beliefs are admissible either as non-hearsay, or as a widely recognized exception to the hearsay rule. *See* McCormick *Law of Evidence*, 2d Ed., § 249.

A survey which garners the reactions of individuals to sexually explicit materials are clear records of those individuals' attitudes and, therefore, the community's attitude or state of mind at the time of the survey and, as such, the results fall squarely within the definition of relevant, necessary and desirable evidence. Moreover, in an obscenity case, the importance of a scientific assessment of the community's attitudes, tolerance or standards about sexual depictions or descriptions is surely beyond question. In *Pinkus* v. *United States*, 436 U.S. 293, 98 S.Ct. 1808 (1978), the Supreme Court took note of defense evidence that consisted of "testimony and surveys offered to demonstrate that the materials did not appeal to prurient interests, were not in conflict with community standards and had redeeming social value." *Id.* at 296, 98 S.Ct. at 1810.

Although the prosecution is not required to introduce evidence in support of the allegation of obscenity, apart from the material itself, such evidence may still be presented by the defendant. *Kaplan* v. *California*, 413 U.S. 115, 121, 93 S.Ct. 2680 (1973). *See also United States* v. *Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975). In fact, in *United States* v. *Womack*,

509 F.2d 368 (D.C. Cir. 1972), the court stated that "testimony on contemporary community standards is desirable and *may even be a necessary requirement of due process.*" *Id.* at 376 (emphasis added).

In *Knight* v. *State*, 642 S.W.2d 180 (Tex. Crim. App. 1982), the court held that *any* appropriate testimony regarding community standards proffered by a defendant in an obscenity case should be admitted as relevant and material to the process of determining if the challenged item is obscene. Moreover, in *Carlock* v. *State*, 609 S.W. 2d 787 (Tex. Crim. App. 1980), in a prosecution for commercially distributing obscene material with knowledge of the content of the material, the court held that testimony regarding a survey summary dealing with community standards regarding explicit sexual materials was relevant to a determination of a material fact issue, and was therefore, *not excludable even in the exercise of judicial discretion.*

Similarly, in *People* v. *Nelson*, 43 Ill. 476, 410 N.E.2d 476 (1980), the court held that a public opinion poll showing that Illinois residents found the depiction of nudity and actual or simulated sexual activites to be acceptable was relevant to the question of whether such depictions were "patently offensive," because, by definition, "acceptable" materials are not "offensive." Moreover, the poll was also relevant to the question of whether such material appealed to the "prurient interest" for purposes of prosecution under the obscenity statute. Finally, the court held that because the public opinion survey did not deal with the particular movies involved in the prosecution, that did *not* prevent the survey from being relevant. While the prosecution admittedly has no burden to introduce any evidence as the relevant community standards, that alone cannot justify a court's denial of the defendant's right to introduce the best evidence he can gather on this issue. *Id.* at 478-79.

In *Miller* v. *California*, 413 U.S. 15, 32, 93 S.Ct. 2607 (1973) at n.12, the Court considered a state witness, who had been a police officer for many years, that had conducted a

state-wide survey of California which was presented as evidence of contemporary California community standards. This Court's approving reference to this material not only in *Miller, supra*, but also in *Pinkus, supra*, together with the inceasing acceptance and desirability of survey evidence in the courts of other jurisdictions, firmly establishes the recognition of such evidence as important, valuable, and admissable in cases such as the one at bar, the denial of which denies a defendant due process of law and equal protection of the law.

CONCLUSION

For all the foregoing reasons, Petitioner J & N Video, Inc. requests that this Court issue a Writ of Certiorari to the Campbell County Circuit Court of Kentucky.

Respectfully submitted,

SIRKIN, PINALES, MEZIBOV & SCHWARTZ

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CERTIFICATION OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been forwarded by regular U.S. mail to Paul H. Twehues, Jr., Campbell County Attorney, 331 York Street, Newport, Kentucky 41071, and to Justin D. Verst, Assistant Campbell County Attorney, 331 York Street, Newport, Kentucky 41071, on this 29 day of December, 1989.

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APPENDIX

SUPREME COURT OF KENTUCKY

89-SC-433-D

J & N VIDEO, INC.,

Movant,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON REVIEW FROM COURT OF APPEALS
89-CA-000769
(Campbell Circuit Court #88-XX-000034)

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED October 11, 1989.

/s/ ROBERT J. STEPHENS
Chief Justice

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 89-CA-769-D
CORRECTED ORDER

J & N VIDEO, INC.,

Movant,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON MOTION FOR DISCRETIONARY REVIEW
FROM CAMPBELL CIRCUIT COURT
ACTION NO. 88-XX-34

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: HOWERTON, CHIEF JUDGE: CLAYTON AND REYNOLDS, JUDGES.

This Court, having considered the motion for discretionary review and the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, DENIED.

ENTERED: May 17, 1989.

/s/ CHARLES H. REYNOLDS
Judge, Court of Appeals

* CORRECTED TO RELFECT MAY 17, 1989, AS DATE ORDER ENTERED RATHER THAN MARCH 17, 1989.

COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
SECOND DIVISION

CASE NO. 88-X-034

J & N VIDEO, INC.,
Defendant/Appellant,

vs.

COMMONWEALTH OF KENTUCKY,
Plaintiff/Appellee.

JUDGMENT

This is an appeal from the Campbell District Court, in which the defendant, J & N Video, Inc., was convicted by a jury of the misdemeanor offense of distribution of obscene matter in violation of KRS 531.020, and given a fine in the amount of $10,000.

Appellant presents three issues on appeal.

First, appellant contends that the statutes under which this case has been prosecuted are unconstitutional on their face due to overbreath and vagueness. KRS 531.010 is a definition section defining "distribute", "matter", "obscene", and "sexual conduct". KRS 531.020 defines the prohibited conduct of distribution of obscene matter. The language in KRS 531.020 and KRS 531.010 is drafted in a manner that clearly defines protected expression as opposed to "obscene" expression which is subject to restriction. The Kentucky Statutes are drafted in conformance with the holding of *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 2nd 419 (1973).

Appellant's first argument concerning the Kentucky Statutes also contends that there is a denial of access to the video tapes which violates the fundamental right of privacy

that adult persons and members of society have in making decisions regarding sexual stimulation and enjoyment. In other words, because one has a constitutional right to possess video tapes in the home, this right creates a correlative right for the appellant to be able to distribute the videos.

There are protected individual choices that a person may make without unjustified governmental interference. But, the constitutional right to possess obscene material in the privacy of one's own home does not create a right to acquire obscene material nor permit interstate transportation, sale, importation or distribution of obscene matter. See, *U.S.* v. *12 200 Ft. Reels of Super Eight mm Film*, 413 U.S. 123, 37 L.Ed. 2nd 500, 93 S.Ct. 2665 (1973). The right to possess obscenity in the privacy of one's home is narrowly defined. That right of privacy does not permit the appellant to distribute obscene video tapes. The compelling state interest in restricting the sales of adult video tapes is narrowly defined only in the those circumstances where the trier of fact determines that the video tapes are "obscene" under the guidelines of KRS 531.010(3).

In appellant's second assignment of error, it contends that the District Court erred in denying its motion for mistrial following a request that Juror Susan Compton be examined by the Court. The juror approached the Trial Court after viewing the third video tape. The Trial Court properly refused to answer any questions of Ms. Compton. The record does not indicate what the juror had in mind and particularly whether or not she had made her mind up against or for the Commonwealth of Kentucky and/or J & N Video, Inc. The Trial Judge's refusal to not answer a juror's question is not grounds for reversal of conviction. See, *Scruggs* v. *Commonwealth*, Ky., 566 SW2d 405, *cert. denied*, 439 US 928, 99 S.Ct. 314, 58 L.Ed.2d 328 (1978). It was proper for the Trial Court not to answer any questions of juror Susan Compton.

In appellant's third assignment of error it contends that the Trial Court abused its discretion in failing to permit appellant to introduce expert testimony relative to contemporary community standards. The Court refused testimony by Dr.

Robert Noelker and Dr. Joseph Scott, which included a survey and an opinion based upon the results of that survey.

As to the defense witness, Dr. Robert Noelker, the Court accepted Dr. Noelker as an expert witness concerning the third prong of the definition of "obscenity" under KRS 531.010, that being whether the matter, taken as a whole, lacks serious scientific value. Appellant attempted to qualify Dr. Noelker on the first prong of the definition of "obscenity", that being whether the average person applying contemporary community standards, the predominant appeal of the matter, taken as a whole, was to the prurient interest of sexual conduct. The Trial Court ruled that the prurient interest test was a determination that would be made by the trier of fact, the jury.

Whether material appeals to the "prurient interest" and what is "patently offensive" are questions of fact for the jury. See, *Miller*, *supra*. The United States Supreme Court recognized that obscenity is not a subject that lends itself to the traditional use of expert testimony. See, *Paris Adult Theatre* v. *Slaten*, 413 US 49 (1973). Trial Courts have been given wide discretion as to the admissibility of expert testimony in obscenity cases. See, *State* v. *Anderson*, 366 NE2d 459 (North Carolina 1988). Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences. But, the expert is prohibited from invading the province of the jury on the ultimate issue of fact in the case. In applying the rule, the Trial Court is afforded wide discretion and will be reversed only on an abuse of that discretion. See, *Hamling* v. *United States*, 418 U.S. 87, 108, 94 S.Ct. 2287, 2903, 41 L.Ed.2d 590, 615 (1974).

As to the defense witness, Dr. Joseph E. Scott, the appellant attempted to qualify Dr. Scott as an expert concerning whether the material, taken as a whole, lacks serious scientific value. During vior dire examination out of the presence of the jury, Dr. Scott testified that his testimony would be based solely upon a survey he conducted of residents of Campbell County. The Trial Court ruled that the survey was

not admissible. The Trial Court ruled that the survey and its results were not relevant to the issues before the jury as to whether the four videos in question were obscene. The individuals questioned in Campbell County were not shown the videos nor were the videos described to them in the survey. The people in Campbell County were asked general questions as to their acceptance of nudity and sex in the privacy of their home, and whether they would want to have the right to view films involving explicit sexual matters in the privacy of their homes.

Courts have recognized that properly conducted public opinion surveys may be useful in gaging community standards for the purpose of determining whether the materials at issue are obscene. To be admissible, however, a public opinion poll must be relevant; it must ask questions concerning the materials involved in the case or works that are "clearly akin" to the charged materials. See, *Various Articles of Merchandise*, 750 F2d at 599; see also *Flynt* v. *State*, 153 Ga. App. 232, 264 S.E.2d 669, 672, *cert. denied*, 449 U.S. 888, 101 S.Ct. 245, 66 L.Ed.2d 114 (1980). The poll must address whether the interviewee believes that the materials at issue or similar materials depict nudity and sex in an acceptable manner.

The poll at issue in this case did not question interviewees regarding the videos at issue or similar materials. Rather, the poll inquired into their opinions on the viewing of nudity and sex, defined broadly. Appellant's opinion poll concerning viewing of nudity and sex in the abstract or whether adults should be able to buy or rent materials depicting nudity and sex are not relevant to the question whether videos such as those at issue are actually accepted in the Campbell County community.

Therefore, because the interviewees in the Campbell County poll were not sufficiently apprised of the nature of the charged materials, the responses to the poll were irrelevant to the issues involved in this case. See, *U.S.* v. *Pryba*, 678 F.Supp. 1225 (E.D. Va. 1988).

The Trial Court properly exercised its discretion and ex-

cluded testimony as to the results of the survey being without a proper foundation. In the same manner, the Trial Court excluded the testimony of Dr. Scott concerning his opinions based solely on the survey results.

Accordingly, IT IS HEREBY ORDERED AND ADJUDGED that the Judgment of the Campbell District Court, pursuant to a jury verdict finding the defendant guilty of distribution of obscene matter in violation of KRS 531.020 be and the same hereby is affirmed.

/s/ LEONARD L. KOPOWSKI
Chief Judge

cc: Mr. Justin D. Verst
Mr. Richard R. Slukich
Mr. H. Louis Sirkin
Mr. Paul H. Twehues, Jr.
Hon. Daniel Guidugli, District Judge

I certify that I have this date mailed a true copy of the foregoing to all counsel of record or parties thereto.
Date 3/9/89

/s/ THOMAS J. CALME
Clerk Campbell Circuit Court
By: _____

CAMPBELL DISTRICT COURT
DIVISION NO. THREE
ACTION NO. 88 M 1028

COMMONWEALTH OF KENTUCKY
vs.
J. & N. VIDEO, INC.

TRIAL AND VERDICT
(Dated August 12, 1988)

This cause coming on for trial on the 8th day of August through the 11th day of August, 1988, and the parties announced ready for trial; came the jury, to-wit: Ruth Doller, Jennifer Arbogast, Everett Gibson, Loraine Flynn, Vera Baumer, and Susan Compton, each of whom were duly impaneled and sworn according to law to try the issue herein.

Having heard the evidence and arguments by counsel for both the Commonwealth and the defendant, and being instructed by the court, the jury retired for deliberation, and after due deliberation, returned the following verdict:

"We the jury find the video cassette movie entitled 'The World According to Ginger' to be obscene, We the jury find the video cassette movie entitled 'I Dream of Ginger' to be obscene, We the jury find the video cassette movie entitled 'Crystal Balls' to be obscene, We the jury find the video cassette movie entitled 'Blazing Zippers' to be obscene, We, the jury, find the defendant, J & N Video Store, Inc., guilty of the offense of distribution of obscene matter as to more than one video cassette movie, under KRS 531.020, and fix its punishment at a fine of $10,000.00" /s/ Everett A. Gibson.

/s/ DANIEL T. GUIDUGLI
District Judge
DATED: 8/12/88

CC: HON. WILLIAM WEHR
HON. JUSTIN VERST
HON. H. LOUIS SIRKIN
HON. RICHARD R. SLUKICH